

FCC MAIL SECTION

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

APR 13 3 53 PM '04

In the Matter of

M&L Enterprises, Inc , d/b/a Skyline  
Telephone CompanyPetition for Waiver of Sections 36.611,  
36.612, and 69.2 (hh) of the Commission's  
Rules

CC Docket No 96-45

**ORDER****Adopted: April 2, 2004****Released: April 12, 2004**

By the Commission

**I. INTRODUCTION**

1 In this Order, we dismiss in part, and grant in part, a request from M&L Enterprises, Inc , d/b/a Skyline Telephone Company (Skyline Telephone), for waiver of sections 36.611, 36.612, and 69.2(hh) of the Commission's rules and on our own motion waive the study area definition in Part 36 of the Commission's rules.<sup>1</sup> Consistent with our efforts to enhance access to affordable telecommunications service for consumers in rural areas, we find that the waivers granted herein will promote increased subscribership and provide appropriate incentives for the deployment of facilities capable of providing supported services in the Mount Hull area of Washington. At the same time, waiver of the Commission's rules as described herein will maintain the integrity and sufficiency of the universal service support mechanisms.

2 As a threshold matter, we conclude that the Petition raises issues beyond those for which Skyline Telephone seeks relief. Specifically, we find that a study area waiver is required in order for Skyline Telephone to receive support for the newly formed study area created as a result of modifications to the study areas of Qwest Corporation (Qwest) and Verizon Northwest Inc (Verizon), respectively, in the State of Washington.<sup>2</sup> On our own motion, we grant Qwest, Verizon, and Skyline Telephone a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules.<sup>3</sup> This waiver will consummate the study area boundary changes of Qwest and Verizon in Washington and enable Skyline

<sup>1</sup> Petition of M&L Enterprises, Inc., d/b/a Skyline Telephone Company for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules (filed May 25, 2001) (Petition), 47 C.F.R. § 36 App.

<sup>2</sup> See Letter from Kirk R. Nelson, Qwest Corporation, to Carole Washburn, Washington Utilities and Transportation Commission, dated Oct. 13, 2000 (Qwest Letter), Letter from Lida C. Tong, Verizon Northwest Inc., to Carole Washburn, Washington Utilities and Transportation Commission, dated Oct. 13, 2000 (Verizon Letter).

<sup>3</sup> See 47 C.F.R. § 36 App.

Telephone to receive high-cost universal service support based on its own costs in the newly established study area. Because Skyline Telephone currently has historical cost data that is necessary to calculate high-cost loop support, we dismiss as moot its request for waiver of sections 36.611 and 36.612 of the Commission's rules. Finally, we grant Skyline Telephone's request for waiver of section 69.2(hh) of the Commission's rules to permit Skyline Telephone to become a member of the National Exchange Carrier Association (NECA) and to participate in NECA pools and tariffs.

## II. BACKGROUND

### A. The Act and Commission Rules

3 The Telecommunications Act of 1996 codified the historical commitment of the Commission and state regulators to promote universal service by ensuring that consumers in all regions of the nation have access to affordable, quality telecommunications services.<sup>4</sup> Specifically, in section 254, Congress instructed the Commission, after consultation with the Federal-State Joint Board on Universal Service (Joint Board), to establish specific, predictable, and sufficient support mechanisms to preserve and advance universal service.<sup>5</sup> Pursuant to section 254(e) of the Act, a carrier must be designated as an eligible telecommunications carrier (ETC) under section 214(e) in order to receive universal service support.<sup>6</sup> Section 214(e) of the Act gives state commissions the primary responsibility for designating a prospective carrier as an eligible telecommunications carrier.<sup>7</sup>

4 The Commission concluded in 1997 that federal universal service support for all carriers, both rural and non-rural, should be based on the forward-looking economic cost of constructing and operating the network used to provide the supported services, rather than each carrier's embedded costs.<sup>8</sup> Nevertheless, at the request of the Joint Board and rural carriers, the Commission proceeded initially with reform of the high-cost support mechanism for non-rural carriers.<sup>9</sup> Recognizing that "rural carriers generally serve fewer subscribers, serve more sparsely

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (Act). References to section 254 in this Order refer to the universal service provisions of the 1996 Act, which are codified at 47 U.S.C. § 254 of the Act.

<sup>5</sup> 47 U.S.C. § 254.

<sup>6</sup> 47 U.S.C. § 254(e). To be designated as an eligible telecommunications carrier under section 214(e), a carrier must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area. See 47 U.S.C. § 214(e)(1).

<sup>7</sup> 47 U.S.C. § 214(e)(2) ("A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [Section 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission.")

<sup>8</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8888, para. 199 (1997) (*First Report and Order*) (subsequent history omitted). The term "embedded costs" refers to a carrier's historic costs, as reflected in its books.

<sup>9</sup> *Id.* at 8936, para. 294. The term "rural carriers" refers to local exchange carriers (LECs) that meet the statutory definition of rural telephone company in section 153(37) of the Act. See 47 U.S.C. § 153(37). Under this definition, rural telephone companies are LECs that either serve study areas with fewer than 100,000 access lines or meet one of three alternative criteria. *Id.* The term "non-rural carriers" refers to LECs that do not meet the statutory definition of a rural telephone company. The forward-looking mechanism for non-rural carriers was implemented on January 1, 2000. See *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth

populated areas, and do not generally benefit as much from economies of scale and scope,” the Commission concluded in the *First Report and Order* that a gradual shift to a forward-looking economic cost methodology was appropriate for rural carriers.<sup>10</sup> Section 54.305 was adopted in the *First Report and Order* as a temporary measure aimed at discouraging carriers from transferring exchanges merely to increase their share of high-cost universal service support during the Commission’s transition to universal service support mechanisms based on the forward-looking economic cost of operating a given exchange.<sup>11</sup> The Commission was concerned that, until support for all carriers is based on a forward-looking economic cost methodology, potential universal service payments may unduly influence a carrier’s decision to purchase exchanges from other carriers.<sup>12</sup> In the *Rural Task Force Order*, the Commission reaffirmed that section 54.305 serves the important purpose of discouraging carriers from transferring exchanges merely to increase their share of high-cost universal service support, but modified section 54.305 to provide additional support to rural carriers that make substantial investment after acquiring exchanges.<sup>13</sup>

## B. The Petition

5 Skyline Telephone was authorized to begin providing telecommunications service in the State of Washington on June 28, 2000.<sup>14</sup> On October 13, 2000, Qwest submitted a filing with the Washington Utilities and Transportation Commission (Washington Commission) outlining boundary changes of the Qwest Oroville Exchange in conjunction with the “transfer” of a portion of the exchange to Skyline Telephone.<sup>15</sup> Verizon submitted a similar filing with the

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Order on Reconsideration, CC Docket No. 96-45, 14 FCC Rcd 20432, 20439, para. 11 (1999) (*Ninth Report and Order*), remanded, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10<sup>th</sup> Cir. 2001), *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-249, (rel. Oct. 27, 2003). See also 47 C.F.R. §§ 54.309 (forward-looking support), 54.801-54.809 (interstate access support).

<sup>10</sup> *First Report and Order*, 12 FCC Rcd at 8936, para. 294. In 2001, consistent with the recommendations of the Joint Board, the Commission modified its rules for providing high-cost universal service support to rural companies based on embedded costs for a five-year period. See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*Rural Task Force Order*), recon. pending.

<sup>11</sup> See *First Report and Order*, 12 FCC Rcd at 8942-43, para. 308.

<sup>12</sup> *Id.*

<sup>13</sup> See *Rural Task Force Order*, 16 FCC Rcd at 11284, para. 97. The “safety valve” mechanism enables rural carriers acquiring access lines to receive additional high-cost loop support over a period of five years reflecting post-transaction investments made to enhance the infrastructure of and improve the service in acquired exchanges. Safety valve support provides up to 50% of any positive difference between a rural carrier’s index year high-cost loop support expense adjustment for the acquired exchanges and subsequent year expense adjustments. *Id.* at 11285, para. 98.

<sup>14</sup> See Petition at 2-3 and Attachment A. Skyline Telephone states that it qualifies as a “rural telephone company” under section 153(37) of the Act. See Petition at 11.

<sup>15</sup> See Qwest Letter. Although the Qwest Letter and Verizon Letter each refer to the modifications of their respective study areas as involving “transfers” of exchanges, we find below that the modifications did not involve “transfers” within the meaning of section 54.305 of the Commission’s rules. See *infra* para. 16.

Washington Commission to modify the Verizon Tonasket Exchange following the "transfer" of a portion of the exchange to Skyline Telephone<sup>16</sup> On April 26, 2001, the Washington Commission designated Skyline Telephone an ETC for the Mount Hull exchange, a high-cost rural area that was created as a result of modifications to the exchange boundaries of Qwest and Verizon in the State of Washington<sup>17</sup>

6 On May 25, 2001, Skyline Telephone filed a petition for waiver of sections 36.611, 36.612, and 69.2(hh) of the Commission's rules As requested, waiver of sections of 36.611 and 36.612 of the Commission's rules would enable Skyline Telephone to receive accelerated high-cost loop support payments<sup>18</sup> Waiver of section 69.2(hh) would permit Skyline Telephone to become a member of NECA and to participate in NECA pools and tariffs<sup>19</sup> In the absence of the requested waivers, Skyline Telephone maintains that it will be compelled to utilize other recovery mechanisms, including an increase in local rates, to recover amounts that would otherwise be recovered from the federal universal service fund<sup>20</sup>

### III. DISCUSSION

7 Generally, Commission rules may be waived for good cause shown<sup>21</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid<sup>22</sup> The Commission, however, may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>23</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis<sup>24</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest<sup>25</sup>

8 As a threshold matter, we conclude that the Petition raises issues beyond those for which Skyline Telephone seeks relief Specifically, we conclude that Qwest, Verizon, and Skyline Telephone should have sought waivers of the study area boundary freeze in order for Skyline Telephone to receive high-cost support for the new study area created as a result of modifications to the study areas of Qwest and Verizon in the State of Washington For the

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<sup>16</sup> See Verizon Letter

<sup>17</sup> See Petition at 3, *see also* Order Granting Petition of M&L Enterprises, Inc., d/b/a Skyline Telephone Company for Designation as an Eligible Telecommunications Carrier, Docket No. UT-013022 (Apr. 26, 2001) (*Skyline Telephone ETC Designation Order*), Letter from Chmn. Marilyn Showalter, Commr. Richard Hemstad, Commr. Patrick J. Oshie, Washington Utilities and Transportation Commission, to Chmn. Michael K. Powell, Federal Communications Commission, dated Oct. 7, 2002 (*Washington Commission Oct. 7 Letter*) at 2

<sup>18</sup> See Petition at 12

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 4

<sup>21</sup> 47 C.F.R. § 1.3

<sup>22</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*)

<sup>23</sup> *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*)

<sup>24</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>25</sup> *Id.*, *see also* 47 C.F.R. § 1.3

reasons set forth below, on our own motion, we grant Qwest, Verizon, and Skyline Telephone a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules<sup>26</sup> In so doing, we recognize the policies underlying the study area boundaries, as expressed by the Commission in 1984, namely to prevent the establishment of high-cost exchanges within existing service territories as separate study areas to maximize high-cost support<sup>27</sup> We also believe that the waiver granted herein meets the goals of maintaining integrity and sufficiency of the universal service support mechanisms and working with the states to promote increased subscribership and provide appropriate incentives for the deployment of facilities capable of providing the supported services, as contemplated in sections 214 and 254 of the Act<sup>28</sup>

9 Because Skyline Telephone currently has historical cost data that is required to calculate high-cost loop support, we dismiss as moot its request for waiver of sections 36.611 and 36.612 of the Commission's rules We do, however, grant Skyline Telephone's request for waiver of section 69.2(hh) of the Commission's rules, as discussed below

#### **A. Study Area Waiver**

##### **1. Background**

10 A study area is a geographic segment of an incumbent LEC's telephone operations Generally, a study area corresponds to an incumbent LEC's entire service territory within a state Study area boundaries are important primarily because incumbent LECs perform jurisdictional separations at the study area level and receive high-cost loop support on a study area basis For jurisdictional separations purposes, the Commission froze all study area boundaries effective November 15, 1984<sup>29</sup> The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze before creating new study areas or reconfiguring existing study areas<sup>30</sup> In evaluating whether waiver of the rule freezing study area boundaries is appropriate, the Commission traditionally has applied a three-prong standard (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges opposes the transfer, and (3) the transfer must be in the public interest<sup>31</sup> In its Petition, Skyline Telephone asserts that it was not required

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<sup>26</sup> 47 C.F.R. § 36 App

<sup>27</sup> See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, CC Docket Nos. 78-72, 80-286, 49 Fed. Reg. 48325 at para. 66 (1984) (*1984 Joint Board Recommended Decision*), Decision and Order, 50 Fed. Reg. 939 at para. 1 (1985) (*1985 Order Adopting Joint Board Recommendation*)

<sup>28</sup> 47 U.S.C. §§ 214, 254

<sup>29</sup> See *1984 Joint Board Recommended Decision*, 49 Fed. Reg. 48325, *1985 Order Adopting Joint Board Recommendation*, 49 Fed. Reg. 939 See also 47 C.F.R. § 36 App

<sup>30</sup> See *1984 Joint Board Recommended Decision*, 49 Fed. Reg. 48325 at para. 66; *1985 Order Adopting Joint Board Recommendation*, 50 Fed. Reg. 939 at para. 1

<sup>31</sup> See, e.g., *U.S. WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-27, 10 FCC Rcd 1771, 1772 (1995) (*PTI/Eagle Order*)

to seek a study area waiver because the Mount Hull area constituted a previously unserved area,<sup>32</sup> relying on a 1996 Common Carrier Bureau Order that had held that carriers are not required to seek study area waivers if a separately incorporated company is establishing a study area for a previously unserved area.<sup>33</sup>

## 2. Discussion

11 *Necessity of a Study Area Waiver.* We find that the exchanges now served by Skyline Telephone were within the Qwest and Verizon study areas, and therefore a study area waiver request should have been filed.<sup>34</sup> The Commission has never enunciated an exception to its study area waiver requirements for unserved areas, nor has the term “unserved” been defined for purposes of the study area waiver requirements specifically, or Part 36 of the Commission’s rules, more generally. We now conclude that treating an area as unserved when it was previously within an existing study area would be inconsistent with the purpose of the study area freeze, as discussed more fully below. Our conclusions herein are limited to the issues raised in this matter and do not prejudice the Commission’s broader determination of what constitutes an unserved area in other contexts.

12 The Commission’s primary objective in freezing study area boundaries was to prohibit companies from setting up high-cost exchanges within existing service territories as separate study areas to maximize high-cost support. While the Washington Commission has authority to designate eligible telecommunications carriers within the state,<sup>35</sup> the designation of Skyline Telephone as an ETC for the Mount Hull exchange resulted in the creation of a “high-cost” area that was previously within the study areas of Qwest and Verizon in the State of Washington. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. The series of events in the instant matter highlight the potential impact that such designations may have on the federal universal service support mechanisms.

13 We clarify that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas. Any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order*. This will ensure that the Commission has an opportunity to determine whether the creation of a new study area will have an adverse impact on the federal universal service fund,

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<sup>32</sup> See Petition at 3 n 5.

<sup>33</sup> See Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of “Study Area” in the Part 36 Appendix-Glossary of the Commission’s Rules, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, at para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*). The Common Carrier Bureau now is known as the Wireline Competition Bureau (Bureau). In the *Study Area Waiver Exceptions Order*, the Bureau held that carriers are not required to seek study area waivers if: (1) a separately incorporated company is establishing a study area for a previously unserved area, (2) a company is combining previously unserved territory with one of its existing study areas in the same state, and (3) a holding company is consolidating existing study areas in the same state. *Id.*

<sup>34</sup> We also note that, as eligible telecommunications carriers, Qwest and Verizon are required to provide supported services throughout their designated service areas under section 214(e)(1) of the Act. See 47 U.S.C. § 214(e)(1). As incumbent LECs, the designated service areas for Qwest and Verizon are their respective study areas for purposes of section 214(e)(1) of the Act.

<sup>35</sup> See 47 U.S.C. § 214(e)(2).

consistent with section 254 of the Act. We also clarify that a study area waiver request is not required when a company is combining previously unserved territory with one of its existing study areas in the same state, or when a holding company is consolidating existing study areas in the same state.<sup>36</sup> In the instant case, the modification of the Qwest and Verizon study area boundaries in Washington resulted in the creation of an entirely new service area. Accordingly, we find that a study area waiver is required to alter the boundaries of the Qwest and Verizon study areas in Washington and create a new study area for the territory served by Skyline Telephone.

14 *Grant of Study Area Waiver.* On our own motion, we find that good cause exists for waiver of the definition of “study area” contained in Part 36 Appendix-Glossary of the Commission’s rules to permit Qwest and Verizon to alter the boundaries of their respective study areas in Washington and recognize Skyline Telephone’s service territory in Washington as a study area for regulatory purposes.

15 First, we conclude that the federal universal service fund will not be adversely affected by modification of the Qwest and Verizon study area boundaries in Washington. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, we analyze whether a study area waiver will result in an annual aggregate shift in high-cost support in an amount equal to or greater than one-percent of the total high-cost fund for the pertinent funding year.<sup>37</sup> Skyline Telephone estimates annual high-cost support of approximately \$71,000, an amount that is substantially less than one-percent of the total high-cost support fund for the year 2004.<sup>38</sup>

16 We conclude that Skyline Telephone, as a rural carrier, is eligible for high-cost universal service support based on its own embedded costs. Section 54.305 of the Commission’s rules does not apply because the modifications to the Qwest and Verizon study areas in Washington did not involve transfers of facilities or customers to Skyline Telephone. If section 54.305 did apply, Skyline Telephone would be limited to the same per-line levels of support that Qwest and Verizon were receiving prior to the respective modifications of each carrier’s study area in Washington.<sup>39</sup> Previously, section 54.305 has applied to limit per-line high-cost support received by a carrier acquiring exchanges from an unaffiliated carrier to the same level of

<sup>36</sup> See *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para. 9.

<sup>37</sup> See *PTI/Eagle Order*, 10 FCC Rcd at 1774, paras. 14-17. The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because of the indexed cap, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund. *Id.* at 1773, para. 13. After adoption of section 54.305(a) of the Commission’s rules, however, the one-percent guideline was not, in practice, a necessary limitation because section 54.305(a), by definition, ensures that there will be no adverse impact on the universal service fund by restricting support to a carrier purchasing exchanges from an unaffiliated carrier to the same level of per-line high-cost support that the selling company received for the exchanges prior to the transfer. See 47 C.F.R. § 54.305(a). Consistent with past precedent, however, we apply the one-percent guideline to determine the impact on the federal universal service fund in light of the adoption of safety valve support, which allows an acquiring carrier to receive support for new investments in acquired lines. See *supra* para. 4 n. 13 (discussing “safety valve” support).

<sup>38</sup> Letter from Gerald Duffy, Attorney for M&L Enterprises, Inc., d/b/a Skyline Telephone Company, to Marlene Dortch, FCC, dated July 25, 2003 (*Skyline Telephone July 2003 Letter*) (submitting a completed Universal Service Fund Data Collection Form).

<sup>39</sup> 47 C.F.R. § 54.305(a).

support received by the selling company prior to the transfer.<sup>40</sup> In those instances, the transactions involved sales of exchanges that served various access lines.<sup>41</sup> In contrast, here, there was no sale or transfer of facilities in the transactions that modified the Qwest and Verizon study areas in Washington and, thereby, resulted in the creation of the Mount Hull exchange that is currently served by Skyline Telephone. There were also no customers in the areas affected by the boundary changes.

17 Second, the state commission with regulatory authority over the transferred exchanges does not oppose the transfer. The Washington Commission approved the letter filings of Qwest and Verizon modifying their respective study area boundaries in Washington. The Washington Commission has also designated Skyline Telephone as an ETC for the Mount Hull exchange.<sup>42</sup>

18 Third, we conclude that the public interest is served by waiver of the study area freeze to consummate the study area boundary changes of Qwest and Verizon and to recognize Skyline Telephone's service territory in Washington as a study area for regulatory purposes. As of late 2002, Skyline Telephone provided telecommunications service to approximately 115 customers in the Mount Hull exchange that did not previously have telephone service.<sup>43</sup> Skyline Telephone also represents that it has constructed facilities and invested over \$890,000 to provide service in the Mount Hull exchange.<sup>44</sup> Moreover, Skyline Telephone has indicated its intention to expand its provision of service in the State of Washington.<sup>45</sup> Collectively, we conclude that these efforts demonstrate Skyline Telephone's commitment to provide telecommunications service in the Mount Hull area. We therefore find that waiver of the study area boundary freeze in the instant matter will serve the public interest.

## **B. Waiver of Sections 36.611 and 36.612**

### **1. Background**

19 High-cost loop support is calculated using data provided by incumbent LECs

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<sup>40</sup> See, e.g., *Nemont Telephone Cooperative, Inc. Missouri Valley Communications, Inc. Reservation Telephone Cooperative and Citizen Telecommunications Company of North Dakota, Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.42(c)(2), 69.3(e)(11), and 69.605(c) of the Commission's Rules*, Order, CC Docket No. 96-45, 18 FCC Rcd 838, 842, paras. 9-10 (Wire Comp. Bur. 2003), *Federal-State Joint Board on Universal Service, Blackduck Telephone Company, Arvig Telephone Company, Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules and Related Waiver of Section 54.305 of the Commission's Rules*, Order, CC Docket No. 96-45, 17 FCC Rcd 24602, 24606, para. 8 (Telecomms. Access Pol. Div. 2002), *Norway Rural Telephone Company and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission's Rules*, Order, CC Docket No. 96-45, 17 FCC Rcd 20127, 20131, paras. 10-11 (Telecomms. Access Pol. Div. 2002).

<sup>41</sup> *Id.*

<sup>42</sup> See *Skyline ETC Designation Order, Washington Commission Oct. 7 Letter*.

<sup>43</sup> See *Washington Commission Oct. 7 Letter*.

<sup>44</sup> See *Petition* at 6.

<sup>45</sup> *Id.* at 9.



pursuant to the Commission's cost accounting and data collection requirements.<sup>46</sup> In accordance with section 36.611 of the Commission's rules, on July 31 of each year, incumbent LECs file the preceding year's loop cost data with NECA.<sup>47</sup> NECA compiles and analyzes these data to determine the average cost per loop for each incumbent LEC study area, adjusted by the indexed caps on the high-cost fund.<sup>48</sup> Each rural carrier's high-cost loop support for the following year is based on the relationship between the carrier's study area average cost per loop and the nationwide average cost per loop, as limited by the indexed caps.<sup>49</sup> Because the cost data are not submitted by carriers until seven months after the end of a calendar year (i.e., July 31), and NECA requires time to analyze the data and make the necessary nationwide calculations of support by determining the nationwide average loop cost adjusted to reflect the indexed caps, carriers generally do not receive high-cost loop support based on these data until the beginning of the second calendar year after the costs are incurred.<sup>50</sup> As a result, carriers without historical data, such as newly established carriers, may wait more than two years before receiving any high-cost loop support payments.

20 Under section 36.612 of the rules, however, carriers can update their data on a quarterly basis and receive support earlier than the beginning of the second calendar year after incurring the costs.<sup>51</sup> If a carrier files a quarterly update, by September 30, for instance, NECA recalculates high-cost loop support for all carriers based in part on that carrier's updated data (e.g., cost data covering the last nine months of the previous calendar year and the first three months of the current calendar year, as well as its loop counts), rather than the calendar year data submitted on July 31. Thus, the quarterly update provision allows carriers to receive support based on updated cost and loop count information earlier than the beginning of the second calendar year after costs are incurred.

21 As a general matter, requests for waiver of sections 36.611 and 36.612 of the Commission's rules have only been granted in limited circumstances, primarily to accelerate the provision of support to cover costs incurred by new carriers initiating service in predominantly unserved areas.<sup>52</sup> In these limited instances, newly established carriers lacking historical cost

<sup>46</sup> See 47 C.F.R. Parts 36, 54, and 69.

<sup>47</sup> See 47 C.F.R. § 36.611.

<sup>48</sup> 47 C.F.R. § 36.601(c).

<sup>49</sup> See 47 C.F.R. § 36.622. For rural incumbent LECs, the national average loop cost has been frozen at \$240.00. *Id.*

<sup>50</sup> See 47 C.F.R. § 36.611.

<sup>51</sup> 47 C.F.R. § 36.612.

<sup>52</sup> *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles*), application for review pending, *Verizon Hawaii Inc. (formerly GTE Hawaiian Telephone Company) Application for Review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc.*, filed Mar. 8, 1998, updated Sept. 4, 2001 (*Verizon Hawaii Application for Review*), *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, AAD 97-41, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*), *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*). See also *Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, *Mescalero Apache Telecom, Inc., Waiver of Sections 36.611(c)(2), 36.612(e)(11), 36.611, and 36.612 of the Commission's Rules*, Order, CC Docket No. 96-45, 16 FCC Rcd (continued )

data have been allowed to receive support based on estimated costs and subject to true-up<sup>53</sup> Where requests for waiver of sections 36 611 and 36 612 have been granted, it was determined that delaying the timing of high-cost loop support under the circumstances presented could have the unintended effect of discouraging new carriers from extending service in unserved remote areas, thereby frustrating the statutory goal of promoting the provision of services at reasonable rates<sup>54</sup>

## 2. Discussion

22 We dismiss as moot Skyline Telephone's request for waiver of sections 36 611 and 36 612 of the Commission's rules As explained in the preceding paragraph, requests for waiver of sections 36 611 and 36 612 have generally only been granted to provide accelerated support to newly established carriers initiating service in predominantly unserved areas These carriers lacked historical data required to calculate support under the Commission's rules

23 Skyline Telephone has served the Mount Hull exchange since April 2001 and submitted historical investment and expense data to reflect its provision of service in this area<sup>55</sup> Because Skyline Telephone currently has historical cost data that is required to calculate high-cost loop support, we find that its request for waiver of sections 36 611 and 36 612 of the Commission's rules is moot Consistent with our findings in this Order, we direct Skyline Telephone to file all necessary historical data with NECA in accordance with section 36 611 and 36 612 of the Commission's rules within thirty days of this Order<sup>56</sup>

## C. Waiver of Section 69.2(hh)

### 1. Background

24 In order to be a member of NECA and to participate in the NECA tariff and pools, a carrier must be a "telephone company," as defined in Part 69 of the Commission's rules<sup>57</sup> Section 69 2(hh) of the Commission's rules defines a "telephone company" as an incumbent LEC as defined in section 251(h)(1) of the Act<sup>58</sup> Furthermore, section 36 611 of the

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( continued from previous page)

3813 (Acc Pol Div 2001) (*Mescalero*) (granting waiver of sections 36 611 and 36 612 of the Commission's rules to carrier expanding service to unserved residences on a Native American reservation), *American Samoa Government and the American Samoa Telecommunications Authority, Petition for Waivers and Declaratory Rulings to Enable American Samoa to Participate in the Universal Service High Cost Support Program and the National Exchange Carrier Association Pools and Tariffs*, Order, CC Docket No 96-45, AAD/USB File No 98-41, 14 FCC Rcd 9974 (Acc Pol Div 1999) (*American Samoa*) (granting waiver of section 36 611 to carrier serving an insular area)

<sup>53</sup> *Mescalero*, 16 FCC Rcd at 3823-25, *South Park*, 13 FCC Rcd at 201-03

<sup>54</sup> *Id*, *Border to Border*, 10 FCC Rcd at 5057 See also 47 U S C § 254(b)

<sup>55</sup> See *Skyline Telephone July 2003 Letter*

<sup>56</sup> Although we dismiss as moot Skyline Telephone's request for accelerated support for prior periods of service, Skyline Telephone shall be eligible to receive high-cost universal service support as of January 1, 2004, notwithstanding the filing deadlines in sections 36 611 and 36.612

<sup>57</sup> See 47 C F R § 69 601

<sup>58</sup> 47 C F R § 69.2(hh)

Commission's rules, which, as previously indicated, governs the submission of data to NECA for purposes of calculating high cost support, only applies to incumbent LECs.<sup>59</sup> Section 251(h)(1) of the Act defines an "incumbent local exchange carrier" as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act.<sup>60</sup> A successor or assign of an incumbent is also an incumbent LEC under section 251(h)(1) of the Act.<sup>61</sup> Skyline is a newly established carrier, and it is neither a successor nor assign of an incumbent LEC.<sup>62</sup> Therefore, Skyline Telephone does not meet the statutory definition of an incumbent LEC.

## 2. Discussion

25. We grant Skyline Telephone's request for waiver of section 69.2(hh) of the Commission's rules in order to allow the carrier to join NECA. In so doing, we conclude that Skyline Telephone has demonstrated that special circumstances warrant a deviation from section 69.2(hh) of the Commission's rules and that it would be in the public interest to grant Skyline Telephone's waiver request.

26. Participation in NECA will allow Skyline Telephone to avoid the costs of filing and maintaining its own company-specific interstate tariffs. As of 2002, Skyline Telephone was providing service to 115 households in the Mount Hull area.<sup>63</sup> Because Skyline Telephone has relatively few customers, the costs of preparing company-specific tariffs could be disproportionately excessive. In addition, because Skyline Telephone has made large capital investments to provide service, its company-specific rates have the potential to be extremely high over the long term.<sup>64</sup> Therefore, it is in the public interest to permit Skyline Telephone and its customers to benefit from the cost savings and lower rates available through NECA participation.

27. When the Commission revised its rules to require that telephone companies be incumbent LECs to participate in NECA tariffs and pools and to file data pursuant to section 36.611,<sup>65</sup> the Commission did not specifically provide for companies, such as Skyline Telephone, that come into existence after the enactment of the 1996 Act. The purpose of the incumbent LEC restrictions in Parts 36, 54, and 69 is to distinguish competitive LECs from incumbent LECs for purposes of calculating access charges and universal service support, not to impose interconnection requirements.<sup>66</sup> Skyline Telephone is the sole provider of service in the area it serves; thus, it is not a competitive LEC.<sup>67</sup> As a rural telephone company, Skyline Telephone is exempt from the interconnection requirements in section 251(c) until the company receives a bona fide request for interconnection, services, or network elements, and the

<sup>59</sup> See *supra* paras 19-20, see also 47 C.F.R. § 36.611.

<sup>60</sup> See 47 U.S.C. § 251(h)(1).

<sup>61</sup> *Id.*

<sup>62</sup> See Petition at 2-3.

<sup>63</sup> See Washington Commission Oct. 7 Letter.

<sup>64</sup> See Petition at 6. As previously indicated, Skyline Telephone represented that it invested over \$890,000.00 to provide service in the Mount Hull service area. See *supra* para 18.

<sup>65</sup> See First Report and Order, 12 FCC Rcd at 9315-16 (amending section 36.611 of the Commission's rules).

<sup>66</sup> See 47 C.F.R. §§ 36.611, 54.301, 54.303, and 69.2(hh).

<sup>67</sup> Petition at 11.

Washington Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act<sup>68</sup>

28 Accordingly, we find that the purposes underlying the incumbent LEC requirements in Parts 36, 54 and 69 of the Commission's rules are not applicable to Skyline Telephone's request to receive high-cost universal service support and to participate in NECA. We therefore waive the incumbent LEC requirements in sections 36.611, 54.301, 54.303, and 69.2(hh) of the Commission's rules to permit Skyline Telephone to participate in NECA pools and tariffs and receive high-cost universal service support. This waiver does not affect Skyline Telephone's obligations under section 251 of the Act.

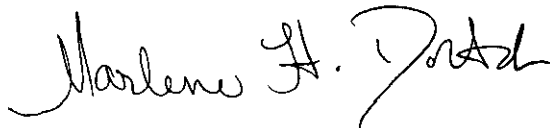
#### IV. ORDERING CLAUSES

29 Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that waiver of Part 36, Appendix-Glossary, of the Commission's rules IS GRANTED, as described herein, to Qwest Corporation, Verizon Northwest Inc., and M&L Enterprises, Inc., d/b/a Skyline Telephone Company.

30 IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the petition of M&L Enterprises, Inc., d/b/a Skyline Telephone Company for waiver of sections 36.611, 36.612 and 69.2(hh) of the Commission's rules, 47 C.F.R. §§ 36.611, 36.612 and 69.2(hh), IS DISMISSED IN PART, AND GRANTED IN PART to the extent described in this Order.

31 IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that waiver of Sections 36.611, 54.301, and 54.303 of the Commission's rules IS GRANTED, as described herein, to M&L Enterprises, Inc., d/b/a Skyline Telephone Company.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

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<sup>68</sup> See 47 U.S.C. § 251(f)